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Rights, Wrongs, and Comparative Justifications

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Abstract

The goal of this article is to rethink the relationship between the concepts of justification and wrongdoing, which play vital roles in the theory of criminal law. Reading George P. Fletcher's new book, The Grammar of Criminal Law, in the context of his earlier scholarship has led me to one major disagreement with Fletcher as well as with the traditional criminal law doctrine: for Fletcher and many others, wrongdoing and justification mutually exclude each other; for me, they do not.

Consider a hypothetical: a group of people are captured by criminals. The criminals are about to kill everyone but then they have a change of heart and offer their victims a deal: if Jack rapes Jill, the criminals will let everyone go. If not, no one's life will be spared. Realizing that this is the only way to save several lives, including Jill's own, Jack reluctantly agrees. Jill, on the other hand, vehemently protests that she would rather die than be violated. When Jack attempts to overpower her, Jill fights back and seriously injures Jack. At that moment, the police arrive and take everyone into custody. It appears that both Jack and Jill have valid defenses of justification – Jack can successfully claim necessity, and Jill can successfully claim self-defense. But is it fair to say that the two are equally right or that neither of them has committed any wrongdoing?

Focusing on the problem of incompatible justifications, I suggest that we should revise our understanding of justifications in general. Specifically, I argue that, in certain circumstances, justifiable conduct may be wrongful; that in a conflict between two incompatible justifications, one side may be more right than the other; and that justifications should be viewed not as a homogenous group in which each defense has equal importance but as a hierarchical structure in which the place afforded to a defense is determined by its rationale and effect on the rights of others.

The top priority belongs to justifications that do not violate rights of others and, in addition, compel others to behave in a cooperative way (the public duty defenses). The intermediate priority belongs to justifications that neither violate rights of others nor create in others a duty to cooperate (the "special relationship" and autonomy defenses). Finally, the lowest priority belongs to the defense of necessity, which, by design, may involve violation of rights of innocent, unoffending individuals.

RIGHTS, WRONGS, AND COMPARATIVE JUSTIFICATIONS.

Vera Bergelson[*]

INTRODUCTION

The Grammar of Criminal Law[1] ("*The Grammar")* marks a new chapter in George Fletcher's exploration of the fundamental principles of criminal law. Although unquestionably self-standing, *The Grammar* revisits and brings to new light numerous themes and theories that have been at the center of Fletcher's scholarship for the past thirty years. In this article, I try to capitalize on this quality of *The Grammar* as I move back and forth in time addressing some old and some new ideas permeating Fletcher's "mega text." Specifically, I examine the relationship between the theories of wrongdoing and justification as I puzzle over the different nature and effect of various defenses of justification.

The Grammar premises its quest for the universal principles of criminal law on the concept of punishment. Every organized human community has a way to punish its members. Where there is a practice of punishment, there must be a body of legal criteria for determining when the punishment is to be imposed.[2] That for which the punishment is imposed is wrongdoing.[3] Wrongdoing, as Fletcher sees it, can mean one of three things: (a) a breach of duty; (b) harm to legally protected interests; or (c) violation of a norm. The duty-based system focuses entirely on the actor and the inherent wrongfulness of transgressing against one's duty.[4] The harm-based system criminalizes harm or offense to others (using Feinbergian terms) accompanied by a right

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[1] GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, INTERNATIONAL (forthcoming 2007) (manuscript on file with the Cardozo Law Review) [hereinafter GRAMMAR MANUSCRIPT]

[2] *Id.* at 383.

[3] *Id.* at 494.

[4] *Id.* at 58, 62.

violation.[5] Finally, the norm-based system addresses conduct, which the society finds seriously undesirable.[6] In the norm-based system, offenders are punished, at least in part, for their disrespect of the legal order.[7]

For Fletcher, the three theories of criminal wrongdoing are of equal stature and independent of one another. While being sympathetic to all three, Fletcher clearly favors the last one. This choice is consistent with his vertical, "top-down" conception of the law, which focuses on the relationship between the perpetrator and the state. The state makes laws and rightfully demands that the individual respect them. If the individual does not, he commits wrongdoing and deserves punishment.[8] If, on the other hand, the individual does not unjustifiably violate a legal norm, he is morally right and other people may use neither penal sanctions nor private force against him.

This understanding of wrongdoing troubles me on several levels. First, I disagree with Fletcher's emphasis on the norm violation as opposed to the intrinsic quality of an act.[9] If all Fletcher means to say is that, to justify criminal punishment, an act must be not only intrinsically wrong but also prohibited by a legislative act, he is certainly right. However, the way Fletcher insists that the "intrinsic quality of the deed and the violation of the norm are two distinct perspectives on wrongdoing"[10] and the choice of one's focus "highlights a certain way of constructing the criminal law"[11] suggests to me that he chooses one perspective over the other rather than combines both. By choosing norm violation as his focus, Fletcher allows such values as autonomy and dignity only secondary roles in his theory of wrongdoing. Like Fletcher, I distinguish two different meanings of wrongfulness but, unlike him, I derive the concept of punishment from the concept of wrongdoing and not vice versa. Accordingly, for me, an act that does not constitute a punishable wrongdoing may still be wrongful as a significant violation of another person's autonomy or dignity.

Second, I conceptually disagree with the unilateral character of wrongdoing in Fletcher's criminal theory. At one point in the book, Fletcher reflects whether the correct picture of crime is "one of aggression, of line-crossing, as suggested in the beginning of Chapter

5 *Id.* at 60. Fletcher defines "harm" more narrowly as "*irreversibly* negative impact on the protected interests of another." *Id.* (emphasis added). I don't quite see why negative impact has to be irreversible to constitute harm. Does Fletcher mean for instance that wrongful infliction of pain or injury that later heals is not harm?

6 *Id.* at 63-65.

7 GRAMMAR MANUSCRIPT, *supra* note 1, at 88.

8 *Id.* at 493 (defining wrongdoing as "unjustified violation of the statutory law or at least of the basic norms of the legal culture").

9 *Id.* at 48-50.

10 *Id.* at 46.

11 *Id.* at 50.

One? Or is the better picture of crime one of interaction, of victim and offender together generating the homicide, the rape, or the embezzlement?"[12] Wary of "political implications" that might follow if we think of crime "as the product of interaction rather than as suffering caused by unidirectional aggression,"[13] Fletcher excludes the victim's conduct from consideration of the perpetrator's wrongdoing. I believe this to be conceptually unsound. How can we tell whether the perpetrator acted wrongfully when he punched his victim in the nose unless we know what the victim did to the perpetrator? Perhaps he consented, and the punch was a part of a boxing match. Or perhaps the victim had attacked the perpetrator first and the perpetrator had to defend himself. In my view, the concept of wrongdoing makes sense only when a criminal encounter is seen as a conflict of individual rights and duties, and not as an independent act of boundary-crossing.[14]

My disagreement with the theory of wrongdoing presented in *The Grammar* leads me to reexamine Fletcher's views regarding justification and, specifically, the problem of incompatible justifications. That problem arises, for instance, when two parties attack each other under competing claims of justification.[15] Who is right: an

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[12] *Id.* at 371-72.

[13] GRAMMAR MANUSCRIPT, *supra* note 1, at 372.

[14] In *The Grammar*, Fletcher first seems to support the contextualized approach as he maintains that, under the norm-based theory, wrongdoing means "not simply 'causing harm,' but 'causing harm under particular circumstances.'" *Id*. at 64. Yet shortly thereafter, he indicates that he rejects that view. *Id.* at 65. *See also* George Fletcher, *The Nature of Justification*, *in* ACTION AND VALUE IN CRIMINAL LAW 175, 175-86 (Stephen Shute ed., 1993) (arguing against the unity theory of justification). Could it be that Fletcher has "thrown the baby out with the bath water," i.e. while properly rejecting the unity thesis, he has also rejected the contextualized approach in general? That might explain, for instance, his opposition to the theory of comparative criminal liability that views crime as interaction and assigns liability based on the conduct of both the perpetrator and the victim. *See* GRAMMAR MANUSCRIPT, *supra* note 1, at 190, 371-72.

[15] In a very basic form, Douglas Husak defined a conflict of justifications as a situation that involves two actors, A and B, where:
"(1) A performs action x and B performs action y;
(2) Actions x and y are justified; and
(3) Actions x and y conflict."
Douglas N. Husak, *Conflicts of Justification*, 18 L. and PHIL. 41, 44 (1999). This definition, however, is not of much help unless we can determine *when* two actions are in conflict, and Husak persuasively shows that there is no obvious answer to this question. *Id.* I recognize the difficulty of providing a universal definition of a conflict and I will not attempt it here. Instead, at the risk of being over-inclusive, I will consider actions x and y in conflict if (a) action x infringes upon a right of B that is normally protected by criminal law and (b) action y infringes upon a right of A that is normally protected by criminal law. For example, if A attacks B and B uses force in self-defense, their actions are in conflict: A attacks B's right not to be assaulted, and B attacks A's right not to be assaulted. These rights are normally protected by criminal law. However, in this conflict, A, being the aggressor, has lost his right not to be assaulted by B. That's why in my definition I emphasize that the affected rights are *normally* protected by criminal law, although not all participants of the conflict may justifiably claim them during the conflict.

inmate trying to escape from prison under a valid claim of necessity or a prison guard trying to stop him? A man trying to cut off his friend's gangrenous foot in order to save that friend's life or that friend fighting against the unwanted surgery? Since, pursuant to my understanding of wrongdoing, an act does not have to be right in order to be justified, it is that "intrinsic quality" of each party's act that determines the outcome in a conflict of incompatible justifications.

Consequently, this Article has two goals. Its narrow goal is to revisit the problem of incompatible justifications and suggest a way to refine its solution. The broader goal is more ambitious. I attempt to refute the tacit presumption that all justification defenses are alike: if the intrinsic quality of two justified acts may be different, there must be something in the nature of each particular justification that determines its comparative value. I conclude that, based on their effect on the rights of the participants in a conflict, justification defenses have different hierarchical status and should be analyzed comparatively.

I. CLASSIFICATION OF JUSTIFICATION DEFENSES AND THEIR REQUIREMENTS

A paradigmatic defense of justification provides that a person who has broken the law and committed a prima facie offense nevertheless did "a good thing, or the right or sensible thing, or a permissible thing to do, either in general or at least in the special circumstances of the occasion."[16] Depending on the specific values lying in their foundation, all justifications may be divided into four groups: those based on (i) a public duty; (ii) a "special relationship;" (iii) autonomy; and (iv) efficiency.

The public duty defense is available to a person acting either under an official capacity (a public servant)[17] or court order[18] or a duty or authority to assist or act on behalf of a public officer.[19] For example, a sheriff is justified in entering upon a person's land and taking control of

16 J.L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC'Y 1, 2 (1956-57).

17 Modern penal codes provide general justification for conduct that is "required or authorized by law." Some statutes specifically require that the actor be a public servant. Actors may include members of the military, police officers and other law enforcement personnel. WAYNE R. LAFAVE, CRIMINAL LAW 534-36, 558, 565-66 (4th ed. 2003).

18 "A public officer is justified in detaining an individual, in using a reasonable amount of force against the person of another, or in taking or destroying another's property, when he is acting pursuant to a valid court order requiring or authorizing him so to act." *Id.* at 534.

19 For example, all states permit citizen arrests when a felony is committed in the presence of the individual carrying out the arrest, or when an individual is asked to help to apprehend a suspect by the police. *Id.* at 558-59.

that person's property without the owner's consent, if the sheriff acts pursuant to a judicial attachment order.

The "special relationship" defenses justify certain actors in their use of force against another person for the purpose of promoting the welfare, discipline or safety of that person or other people. For example, a parent of a minor child is justified in using reasonable force for the purpose of promoting the child's welfare (e.g., putting a warm coat on a three-year-old despite the latter's vigorous objections). Similarly, a schoolteacher is justified in using reasonable force upon a student for the purpose of enforcing school discipline. And a doctor is justified in using force for the treatment that would promote physical or mental health of a patient either with the patient's consent or without it in a situation of emergency when no one competent to consent is available.[20]

The autonomy defenses include those protecting people's negative rights in their person and property (self-defense, defense of another, defense of a dwelling, and defense of property), as well as certain positive rights (consent).[21]

Finally, the necessity (balance of evils) defense is designed to promote considerations of efficiency. To qualify for the defense of necessity, which is viewed sometimes as a paradigmatic defense of justification,[22] the defendant has to prove that the harm or evil he was able to avoid was greater than the harm or evil brought about by his nominally criminal conduct. To be justified, the perpetrator must prove that he both (i) objectively made the right choice[23] and (ii) subjectively was motivated by the need to prevent more serious harm or evil. For example, mountain climbers lost in a snow storm would be justified if, in order to save their lives, they took refuge in someone's vacant cabin and appropriated the owner's provisions.[24] In contrast, if they committed the break-in because they believed it to be a lesser evil than remaining hungry for the next few hours, they would not be entitled to the defense.[25] Neither would they be justified if they committed the

[20] *See* MODEL PENAL CODE § 3.08(4) (1980).

[21] Consent may play an inculpatory or an exculpatory role. In the first case, non-consent is an element of an offense; in the second case, consent is a defense. Conceptually, consent may serve as a defense only in instances of consensual bodily harm. Currently, this defense has very limited application. *See* MODEL PENAL CODE § 2.11(2)(b); *see also* Vera Bergelson, *The Right to Be Hurt*: *Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. (forthcoming 2007).

[22] *See, e.g.*, MODEL PENAL CODE § 3.02 (treating the defense of the choice of evils as a model for other justifications).

[23] Many states grant justification to a reasonably mistaken actor who causes harm to another person (e.g., in putative self-defense). I share Fletcher's belief that it is more accurate to analyze mistake as excuse rather than justification. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 371-72, 762 (1978). We exculpate the mistaken actor due to his cognitive impairment and assuming that he would have behaved differently had he known the true facts.

[24] *See* MODEL PENAL CODE § 3.02 cmt. 2, at 9.

[25] *See* MODEL PENAL CODE § 3.02 cmt. 2, at 12 (pointing out that "one who takes a life in

break-in not out of fear for their lives but driven by desire to have a party.[26]

One of Fletcher's important contributions to the theory of criminal law is his persuasive argument that the defense of justification mandates that the perpetrator (i) be aware of the justifying circumstances and (ii) act for the specific purpose of achieving the beneficial outcome. That requirement ensures that only the perpetrator who acted in good faith and in fact had an important reason to overstep a prohibitory norm be justified. For example, self-defense or defense of another, in addition to the awareness of the attack, its imminence and seriousness, also requires proof of the defendant's purpose to protect oneself or another from that attack. Similarly, the "special relationship" defense requires that a parent using physical force to discipline a child, in addition to the knowledge of the child's misconduct, had purpose to promote the child's welfare.[27]

I agree with Fletcher (or perhaps even go farther than he does) in requiring the perpetrator to have justificatory knowledge *and* purpose to qualify for most defenses of justification. At the same time, I recognize that a whole class of public duty defenses does not mandate a particular purpose; mere knowledge of the justifying circumstances is enough. Intuitively, that makes sense: a police officer should not arrest people without a probable cause, and an executioner should not put people to death without an execution order. If, say, an executioner kills a death-row inmate, exactly at the same time and in the same manner as directed in the execution order, yet unaware of that order, the executioner should be guilty of murder. However, it seems ludicrous to deny the executioner a valid defense merely because he was not driven by the desire to advance the ideals of justice. As long as he acts with the knowledge of, and pursuant to, the prescribed procedure, he may have any reason for doing the job.

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order to avoid financial ruin does not act from a justifying necessity").

[26] *See* MODEL PENAL CODE § 3.02 cmt. 2, at 11 (stating that, to qualify for the defense of necessity, "the actor must actually believe that his conduct is necessary to avoid an evil"); R. v. Dadson, 4 Cox. C.C. 358 (1850) (holding that, for a successful defense of justification, not only must the circumstances of justification appear in the case but the defendant must have known of those circumstances). *See also*, George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 318-21 (1975) (arguing that, when consent serves as a defense, the actor must be aware of it); Anthony M. Dillof, *Unraveling Unknowing Justification*, 77 NOTRE DAME L. REV. 1547, 1595-1600 (2002) (arguing in favor of subjective theory of justification). *But see* Larry Alexander, *Lesser Evils: A Closer Look at the Paradigmatic Justification*, 24 LAW & PHIL. 611, 626-36 (2005) (arguing that self-defense but not other defenses requires defendant's knowledge of justifying circumstances); Paul Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 288-91 (1975) (arguing that claims of justification should prevail regardless of the actor's state of mind).

[27] *See* MODEL PENAL CODE § 3.08(2)(a). *See also* LAFAVE, *supra* note 17, at 536-37.

The special nature of the public duty defense was observed two-and-one-half centuries ago by Blackstone.[28] Like all justification defenses of that time, the public duty defense was public in character.[29] But, unlike any other justification, that defense was not merely a permission to overstep a prohibitory norm, it was a "civil duty, and therefore not only justifiable, but commendable, where the law require[d] it."[30]

This characteristic of the public duty defense is responsible for its two significant distinctions. Firstly, it explains why we do not require the perpetrator to have a proper purpose in order to claim the defense. Normally, we want to know *why* the perpetrator chose to break a prohibitory norm and cause harm. For example, under the current law, a person may not give effective consent to serious bodily harm. As I argue elsewhere, this rule should be revised.[31] But even if we agree to recognize an individual's power to authorize his own death or injury, we would still want the perpetrator to demonstrate a valid, benevolent reason for the harmful act.

This requirement is mandated by the fact that consent, even combined with a request, creates a very weak content-independent reason for action, compared to, say, a threat or order by an authority.[32] For example, I may request that my friend cut off my foot. If he does not want to do that, he is under no duty to obey. If, on the other hand, he follows my request, and later, as a defendant in a criminal prosecution, claims a defense of justification, the court may rightfully

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[28] Blackstone specifically addressed only the public official's defense but same is true with respect to all public duty defenses.

[29] For example, a person could be justified for killing another only if: (i) the killing was absolutely commanded by the law in the execution of public justice; (ii) it was permitted by the law if necessary to maintain public order by public officers in performance of their legitimate duties; and (iii) when it was committed by a private party to prevent a forcible and atrocious crime, itself punishable by death. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 178-81 (1st ed. 1769). The first two of the three circumstances clearly refer to conduct authorized by society as a whole. The last one is quasi-public as well. The important difference between it and killing in self-defense, which at the time of Blackstone was only excusable, is that hindering the perpetration of a capital offense was seen as serving the interests of law and order, whereas self-defense was seen merely as an understandable manifestation of the instinct of self-preservation. In this regard, I disagree with a common explanation that prevention of a capital offense was justifiable because the aggressor, by attempting that forcible and atrocious crime, has forfeited his right to life, thus allowing any citizen to "execute" him. *See, e.g.*, Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 65 n. 19 (1984) [hereinafter Dressler, *New Thoughts*]. Attempts were merely misdemeanors under the common law and not punishable by death. In addition, this theory does not explain the difference in the treatment of self-defense and justifiable homicide in prevention of a capital offense.

[30] BLACKSTONE, *supra* note 29, at 178**.**

[31] *See generally* Bergelson, *supra*, note 21.

[32] *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 413 (1988). Based on Raz's definition, a "reason is content-independent if there is no direct connection between the reason and the action for which it is a reason." *Id.* at 35.

question him: "Why did you do that? Why, being under no obligation, did you choose to break a conduct rule and cause harm to another person?" The public official does not have to answer this question exactly because he is *not* a free moral agent: he follows a prescribed procedure and is not supposed to make independent moral choices.[33] Instead, he is required to act as a public agent, under the duty and authority delegated to him by the state.

Secondly, the kind of permission that accompanies the public duty to act is different from the permission provided by other justification defenses. All public officials—a policeman performing a valid arrest, a sheriff taking possession of the debtor's property pursuant to a court judgment, or an executioner giving the prisoner a lethal injection in accordance with the execution order—act under the *right* to act that way. In contrast, people acting in self-defense, or pursuant to necessity or parental authority act merely under a *privilege*.

II. JUSTIFICATION: A RIGHT OR A PRIVILEGE?

What is the difference between a right and a privilege? In his influential work, Wesley Newcomb Hohfeld pointed out that we often use the term "right" indiscriminately to express a range of ideas.[34] He distinguished the concept of a "right" in the strict sense from other similar concepts by putting each of them in a correlative pair.[35]

Pursuant to this typology, a right is a claim by one person against another. The correlative of a right is a duty or, using Judith Jarvis Thomson's term, a behavioral constraint.[36] If X has a right to life, others have a duty not to kill him.[37] If X has a right to kill Y, others (including Y himself) have a duty not to prevent X from killing Y.[38]

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[33] *See, e.g.*, State v. Bridges, 955 P.2d 833 , 834 (Wash. Ct. App. 1998) (holding that, since the prosecutor has no discretion to decline to prosecute someone who satisfies the definition of a persistent offender, a claim that the prosecution was racially motivated is invalid). To the extent a public official may exercise discretion, we do require a valid reason for his decisions (e.g., that a decision to prosecute not be racially motivated). *See, e.g*, Armstead v. Town of Harrison, 579 F. Supp 777, 779 (S.D.N.Y. 1984).

[34] WESLEY NEWCOMB HOHFELD, *Fundamental Legal Conceptions, I, in* CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 23, 36 (Walter Wheeler Cook ed., 1923) (observing that "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense").

[35] *Id.*

[36] *See* Thomson, , *infra* note 64, at 61-78.

[37] Hohfeld, *supra* note 34, at 36-38.

[38] Some scholars pointed out that people never have a *right* to do anything. Instead, they have a *liberty* (privilege) to do the same and a *right* that others do not wrongfully interfere with this liberty. *See* Glanville Williams, *The Concept of Legal Liberty*, *in* ESSAYS IN LEGAL PHILOSOPHY (Robert S. Summers ed., 1968); Husak, *supra* note 15, at 57 n.48. Using this

On the other hand, a privilege is merely one's freedom from the right or claim of another; its correlative is not a duty but a "no right." If Y unlawfully attacks X, X may use force in self-defense. X acts under a privilege, and Y has *no right* that X not act that way. On the other hand, Y does not have a duty to stay put and let X kill him. Y may quite lawfully run away.[39]

The distinction between a right and a privilege is crucial when we consider various justification defenses. As we have already seen, at least one large group of defenses is not like all other ones in terms of its requirements, the nature of permission to act, and consequences to all other parties. We will see later that privilege defenses are not all alike either but, for now, it may be helpful to focus on the difference between rights and privileges and see whether it adds anything meaningful to the old debate about the nature of justification defenses and incompatible justifications.

The essence of the debate was whether justification presumes that the defendant's conduct was "right" or merely "not wrong." Fletcher presented one side of the debate, arguing that only laudatory actions deserved justification and "one party's having a right to engage in specified conduct precludes others from having a right to prevent him from doing so."[40] Thus, for Fletcher, in each conflict, only one party may be justified, and incompatible justifications are impossible by definition.

In contrast, Fletcher's opponents, including David Dolinko and Joshua Dressler, maintained that any "permissible" or "tolerable" conduct should be justified, and incompatible justifications are an inevitable part of life.[41] Accordingly, Dressler would justify both—an inmate attempting an escape from prison under the valid claim of necessity and a prison guard attempting to stop him—whereas Fletcher would justify only the prison guard and, at best, excuse the inmate.

terminology, an easement holder does not have a *right* to pass through his neighbor's land. What he has is a liberty to pass through the neighbor's land and a right that the neighbor, as well as others, not wrongfully prevent him from using his easement. I agree that this terminology is more accurate and, when we say "X has a right to do y," we use conceptual shorthand. However, as Williams pointed out, the use of the word "right" in its extended sense is "inveterate and probably beyond recall." Williams, *supra*, at 140. For that reason, I continue using the shorthand with the understanding of its limitations. Accordingly, a statement "X has a right to kill Y" is a shorthand for "X has a privilege to kill Y and a right that neither Y nor others wrongfully interfere with X's exercise of his privilege." Accordingly, when I compare an act protected by a right with an act protected by a privilege, in its spelled-out form it is a comparison of two acts—one, protected by a mere privilege to act in a certain way, and the other, protected by a privilege to act in a certain way and a right that others do not wrongfully hinder performance of the privileged act.

[39] Hohfeld, *supra* note 34, at 38-50.

[40] George P. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355, 1364 (1979) [hereinafter Fletcher, *Commentary*].

[41] Dressler, *New Thoughts*, *supra* note 29, at 84-92. For the economy of space, I focus on Dressler's work when discussing the position opposite to Fletcher's.

I think that both positions have merit and are flawed at the same time. My own view is that justified conduct does not have to be laudatory; therefore, more than one party in a conflict may be justified. At the same time, the mere fact that more than one party in a conflict is justified does not preclude the possibility of one party being right and other parties being wrong.

A. *Is There the Right Side of a Conflict?*

In most instances, if one party to a conflict is "right," the other is "wrong." This is the basic distinction between a victim and an offender. Here I tend to agree with Fletcher although, unlike him, I do not believe that, to be "right," a person has to be morally and legally impeccable. Being "more right" or "relatively right" is a much more realistic requirement, particularly since numerous sociological and victimological studies show that victims are often active participants of the crime[42] and their actions are similar to those of the offenders.[43] Yet, it would be unfair to treat the two parties equally when one of them was responsible for a much lesser wrong than the other. For that reason, I disagree with Dressler who refuses to distinguish between two conflicting actors whenever each of them is independently justified.

True, justifications often represent competing societal values, and it is not always easy to tell which party is more right. However, if that difficulty were a sufficient reason to withhold judgment, we would have to do so in many other circumstances as well. For example, we say that a justified person is right and an excused person is wrong when they fight against each other. But if the basis for our indecision in cases of incompatible justifications is the clash of values, why aren't we also morally paralyzed when the values underlying justification clash with the values underlying excuse? Shouldn't we, to be consistent, reserve judgment any time both parties have some kind of a defense?

I certainly don't think so. The only situation, in my view, when we truly cannot tell who is right and who is wrong, as between two justified actors, is when both of them claim an identical defense of necessity. In virtually all other cases, such conflict has been logically and

[42] Some researchers have found victim precipitation rates to be as high as 49-67% when victim precipitation was defined as any situation in which provocative behavior of the victim played an important role in the perpetrator's decision to act or encouraged the offender into a progression of violence. *See, e.g.*, Lynn A. Curtis, *Victim Precipitation and Violent Crime*, 21 SOC. PROBS. 594, 597 (1974); T. A. Silverman, Victim Precipitation: *An Examination of the Concept*, *in* VICTIMOLOGY: A NEW FOCUS 99-109 (Israel Drapkin & Emilio Viano eds., 1974).

[43] *See*, *e.g.*, Curtis, *supra* note 42, at 597 (concluding that "distinctions between victims and offenders are often blurred and [are] mostly a function of who got whom first, with what weapon, how the event was reported, and what immediate decisions were made by the police").

legislatively precluded. The Model Penal Code, for instance, justifies the use of force in self-defense only if it is used against *unlawful* force; thus if one party is justified, the other party, by definition, must have used force unlawfully and may not claim valid self-defense.[44] Similarly, if one parent properly exercises his parental authority (e.g., by giving a small child prescribed medication), his act is lawful, and the other parent may not forcibly prevent him from doing that.[45] In contrast, the defense of necessity is based not on individual rights but rather on maximization of *collective* benefit, and thus does not preclude a clash of *individual* interests. Furthermore, the residual, "catch-all" character of that defense presupposes that the legislature has not attempted to preempt potential conflicts.[46]

The necessity hypothetical I have in mind goes like that: a group of people is captured by criminals. The criminals are about to kill everyone but then they have a change of heart and offer their victims a deal: if any two volunteers perform a gladiator fight, the criminals will let everyone go. If not, no one's life will be spared. Jack and Bill volunteer in order to save the lives of the rest of the group.

I think that both Jack and Bill should be justified under the defense of necessity: a gladiator fight involves harm as well as evil but those harm and evil are lesser than the harm and evil that would happen (namely, the slaughter of several innocent people) if Jack and Bill did nothing.[47] Yet, with respect to each other, Jack and Bill certainly acted wrongfully: no matter how noble their motivations were, the direct purpose of their actions was to seriously injure each other. Considering that both Jack and Bill volunteered, their conduct was not *very* wrongful,[48] but to the extent it was wrongful, it was *equally* wrongful for each participant. Thus, neither of them is "more right" than the other, and, say, a third party would not be justified in helping either side

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44 *See* MODEL PENAL CODE § 3.04(1) (1962).

45 *See* MODEL PENAL CODE § 3.08(1). Unfortunately, the Model Penal Code is rather incoherent in its use of the terms "unlawful" and "justifiable." For instance, it views mistaken self-defense as justification. Accordingly, a person (A) who, due to a mistaken and totally unreasonable perception of threat, attacks a bystander (B) is justifiable. If "justifiable" means "lawful," that presumes that B may not defend himself against A, which is absurd. To avoid the absurd result, I suggest that (in addition to treating mistake as an excuse) we interpret "unlawful" as "prima facie unlawful" and rely on specific provisions to regulate conflicts of interests. *See*, *e.g.*, MODEL PENAL CODE § 3.06(3)(b) (disallowing the use of force against a trespasser if "the actor knows that the expulsion of the trespasser will expose him to substantial danger of serious bodily harm").

46 In fact, when the legislature has considered and decided how to treat a specific conflict, the defense of necessity is unavailable. *See* MODEL PENAL CODE § 3.02(1)(b), (c).

47 *See*, *e.g.*, MODEL PENAL CODE § 3.02(1)(a) (providing that conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged").

48 *See* Bergelson, *supra* note 21.

against the other. This case, however, is rather an exception; normally, competing justifications do not preclude one party from being more right than the other.

In sum, balancing different values may be quite difficult but that difficulty is an inherent feature of legal, and particularly criminal, adjudication. With the exception of competing claims of necessity in which the mens rea, actus reus, and all other relevant characteristics of both parties are identical, we should be able to decide who is right and who is wrong in a conflict of two incompatible justifications.

B. *Can More Than One Person Be Justified?*

Fletcher has never disputed that two people may have good defenses as against each other. However, he refused to "use the term 'justification' indiscriminately to include *all issues bearing on* the culpability of actors as well as *the propriety of acts*."[49] The italicized part of this statement makes Fletcher's position very clear: if one act in a conflict is not morally superior to the other, it is not justified at all. Accordingly, Fletcher denies not only conflicting justifications but also partial justifications.

I find this view conceptually unsound. I believe Fletcher is incorrect in his absolutist interpretation of justification. I would argue that, to be justified, an actor does not have to be entirely free from wrongdoing. More specifically, an act may be wrongful with respect to a particular party and still be justified, or, as Douglas Husak well put it, "[n]o one who believes that killings in self-defense are completely justified need suppose that the quantum of wrongfulness in all such killings is equivalent to that in, say, scratching one's head."[50] I think Fletcher should agree with that. Not only has he expressed similar discomfort with a thesis that "reduces killing in self-defense to the same format as killing a fly"[51] but his own theory of self-defense leaves room for a degree of wrongdoing. Consider Fletcher's well-known hypothetical:

> Imagine that your companion in an elevator goes berserk and attacks you with a knife. There is no escape: the only way to avoid serious bodily harm or even death is to kill him. The assailant acts purposively in the sense that his means further his aggressive end. He does act in a frenzy or in a fit, yet it is clear that his conduct is

49 Fletcher, *Commentary*, *supra* note 40, at 1359 (emphasis added).
50 Douglas N. Husak, *Partial Defenses*, 11 CAN. J.L. & JURIS. 167, 172 (1998).
51 Fletcher, *The Nature of Justification*, *supra* note 14, at 183.

> non-responsible. If he were brought to trial for his attack, he would have a valid defen[s]e of insanity.[52]

Fletcher justifies killing of the psychotic aggressor, and I think he is right. But can we honestly say that the killing of a sick person, who is not responsible for his conduct, is also *laudatory, praiseworthy,* or *commendable*? In my view, it would be morally insensitive to use those terms or to deny any wrongdoing in the described situation. Moreover, there is no need to go that far: a successful justification defense does not qualify the perpetrator for the Mother Theresa Award; it merely indicates that an act is not wrongful enough to deserve punishment.

That same principle of insufficient wrongfulness underlies partial justifications. Unlike a complete justification which reduces the wrongfulness of an act to such a degree that it does not merit punishment, a partial justification does not eliminate liability altogether; instead the liability is mitigated.[53] A partially justified act is, therefore, a *wrongful* act that, due to certain mitigating circumstances, is less wrongful than that required by the charged offense.

Similar logic applies to the conflict of complete but competing justifications: both acts are not wrongful enough to merit punishment; however, (at least)[54] one act may be wrongful enough to legitimize the use of force by a private party. For example, let me slightly revise the Jack and Bill hypothetical to make one party more wrong than the other. Assume that this time the criminals conditioned the release of their captives on Jack's rape of Jill. Realizing that this is the only way to save several lives, including Jill's own, Jack reluctantly agrees. Jill, on the other hand, vehemently protests that she would rather die than be violated. When Jack attempts to overpower her, Jill fights back and seriously injures Jack. At that moment, the police arrive and take everyone into custody. Is either Jack or Jill criminally liable, and if not, can either of them claim justification?

If we consider Jack's act alone, it is likely to be justified, for the same reason as in the Jack & Bill hypothetical. Sexual intercourse compelled by force involves both harm and evil. Yet, judging from the objective perspective, those harm and evil are still lesser than the harm and evil brought about by the murder of several innocent people; thus, Jack deserves justification.[55] At the same time, if we consider Jill's

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[52] George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367, 371 (1973).

[53] *See* Husak, *supra* note 50, at 172.

[54] This parenthetical addresses the Jack & Bill exception discussed in the previous section.

[55] The Model Penal Code leaves the issue open: "While there may be situations, such as rape, where it is hardly possible to claim that greater evil was avoided than that sought to be prevented by the law defining the offense, this is a matter that is safely left to the determination and elaboration of the courts." MODEL PENAL CODE § 3.02 cmt. 3, at 14 (1962). On the other hand, according to the Model Penal Code, "the numerical preponderance in the lives saved compared to

conduct alone, it should be justified as well. A person is allowed to use any necessary force, including deadly force, to resist forcible rape.[56] But if both acts are justified, how shall we resolve the conflict between Jack and Jill?

I suggest that we follow the dichotomy described in the *"Grammar"* and conceptually separate two meanings of wrongdoing. Fletcher refers to the German tradition of criminal jurisprudence, which distinguishes the act's incompatibility with a prohibitory norm from the act's intrinsic wrongfulness.[57] I find this distinction very insightful, although I would slightly change the emphasis and characterize the two meanings of wrongdoing as one relating to punishment and the other relating to interpersonal rights. The defense of justification addresses wrongfulness in the first sense: if an act is justified, it is not sufficiently wrongful to merit imposition of a criminal sanction. That, however, does not imply that the same act is not sufficiently wrongful not to merit a defensive action by another person with a conflicting interest. Neither does that imply that the defensive action by the holder of a conflicting interest necessarily strips the initially justified party of valid justification.

Obviously, not every conflicting interest should even be taken into account for the determination of the parties' rights and defenses. In *"The Grammar,"* Fletcher's unilateral vision of wrongdoing leads him to confusion as to when the victim's conduct is relevant to the wrongfulness of the perpetrator's act. He writes:

> [T]here are many situations in which victims . . . provoke the crime—as in the case of homicide where the doctrine of provocation traditionally reduced the offence from murder to manslaughter. Yet there are other situations where drawing attention to the victim's role seems improperly to diminish the responsibility of the offender for the wrongful aggression. Any suggestion, for example, that women sometimes bring on sexual aggression (by scanty dressing or flirtatious behavior) will surely evoke howls of protest. The question is not so much one of fact as of perception.[58]

Had Fletcher not defined wrongdoing in unilateral terms, he would not have had trouble differentiating between the two groups of cases. The first group, which, in addition to provocation cases, includes cases

those sacrificed surely should establish legal justification for the act." *Id.* at 15. The numerical preponderance seems to warrant Jack's justification, even if murder is not worse than rape (one count of rape compared to avoiding several counts of murder).

[56] MODEL PENAL CODE § 3.04(2)(b) (1962) (providing that the use of deadly force is allowed in limited circumstances, including when the actor believes that such force is necessary to protect himself against sexual intercourse compelled by force).

[57] *See* FLETCHER, GRAMMAR MANUSCRIPT, *supra* note 1, at 46-47. Fletcher seems to be sympathetic to this distinction. However, it does not enter into his theory of criminal law as he does not recognize the possibility of a justified act being intrinsically wrong.

[58] *Id.* at 371-72.

of perfect and imperfect (due to excessive use of force)[59] self-defense, shares an important element. In all cases forming that group, the victim was the initial aggressor. He attacked the perpetrator's legally protected interests and, because of that, lost or reduced his own right not to be hurt.[60] In short, the victim, by his own actions, has changed his legal and moral status with respect to the perpetrator, which reduced or eliminated the perpetrator's liability for the harm to the victim.

In contrast, a scantily dressed, flirtatious woman did not change her status with respect to the sex offender because the sex offender did not have a right that the woman dress or act conservatively. What distinguishes the two groups of cases cited by Fletcher is that the perpetrator in the first group suffered an attack on his legally protected right, whereas the perpetrator in the second group had no relevant right to start with. Accordingly, self-defense and provocation are valid defenses to homicide, and a "scanty dress" is not a valid defense to rape.

With this clarification, we can now return to incompatible justifications. If I am correct that justification does not imply the absence of wrongdoing, it is possible to have two justified parties, one of which is more right than the other. Sometimes, one party being more right means that the other party is wrong—not only with respect to the first party but also in general, with respect to society, i.e. sometimes one party's justification not only gives that party private rights against the other party but also defeats the other party's justification. For example, a person may not use self-defense against lawful force (a policeman with an arrest warrant); if he does, he would not be justified. Yet in other instances, one party's being more right only allows that party to use force against the other party but does not destroy the other party's justification (e.g., Jack & Jill's case[61]). In other words, some but not all conflicting justifications are truly incompatible; other conflicting justifications do not preclude each other.

To explain that difference, we need to go back to the right-privilege dichotomy. In the following section, I review what happens when the two competing justifications are (i) both rights, (ii) a right and a privilege, and (iii) both privileges.

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[59] I specify that to distinguish mistaken self-defense, which is sometimes also called imperfect self-defense and which, in my view, is only an excuse, *see supra* note 23, from self-defense, which is imperfect due to excessive use of force and which is partial justification (and often partial excuse, too).

[60] Naturally, in cases of provocation we may talk only about partial justification of the perpetrator. The victim who punches the perpetrator in the nose has certainly lost his right not to be hurt at all. Yet, he has not lost his right not to be killed; therefore, the perpetrator who overreacts and kills the victim may be justified only to a certain degree. In the same way a person who, while acting in legitimate self-defense, oversteps the boundaries of what is necessary and proportionate, is responsible only for the unwarranted "extra" harm.

[61] Why Jill is more right than Jack is discussed *infra* in Section III.C.2.

III. THE HIERARCHY OF JUSTIFICATIONS

A. *Right v. Right*

The public duty group of defenses tops the hierarchy of justifications. Only those defenses give the perpetrator a *right* to break a prohibitory norm when necessary for the performance of his duties. Accordingly, only those defenses disallow others to hinder the right-holder's actions. For example, a sheriff executing a valid writ of attachment may go on the garnishee's land and take control of the garnishee's property, and the garnishee may not force the sheriff to leave and may not hide his property from attachment.

Since each public duty defense imposes on everyone an obligation not to act in a way that would obstruct the performance of the relevant public duty, these defenses cannot clash with one another. A police officer may not arrest the sheriff executing the writ of attachment for trespass or conversion. If he does that, he certainly would not be entitled to justification. To the extent his mistake was reasonable, he might be able to claim excuse, i.e., concede that he was wrong but plead that he should not be punished due to certain explainable impairment of judgment.

B. *Right v. Privilege*

Because of the special nature of right-based justifications, a person acting under a privilege always loses to a person acting under a right. As noted above, if a person acts under a right, other people have a duty not to act in a way that would frustrate his purpose. In contrast, other people do not have a duty to constrain their behavior with respect to a holder of a privilege (e.g., defense of necessity). Therefore, if a holder of a public duty defense finds himself in a conflict with a holder of necessity defense, the latter has to yield. For instance, an inmate attempting to escape from prison may be justified under the necessity defense. However, if a prison guard tries to stop him, the inmate has a duty to cooperate. If he does not and the guard has to shoot him, the guard would be justified. In contrast, if the inmate shoots the guard, no justification would be available to him.

C. *Privilege v. Privilege*

As I discussed earlier, a privilege is the absence of a duty, freedom from the right or claim of another. A privilege may have different

origins: a person may not have a duty in the first place; or a person may contract for a certain privilege; or a privilege may be granted by law. A justification defense based on a privilege permits an actor to break a prohibitory norm under particular circumstances, whereas, in the absence of those circumstances, the actor's conduct would be a criminal offense. A privilege-based justification may be warranted by reasons of "special relationship," autonomy, or efficiency.

Naturally, from time to time, interests promoted by those defenses clash. The outcome of those clashes should be decided by numerous considerations, including the relative (i) magnitude of the interests at stake; (ii) set-backs to those interests; and (iii) causative roles of the parties in bringing about the harm. Yet, all those factors being equal, the determinative consideration should be the ranking of respective justification defenses based on their intrinsic qualities. To rank each defense, it is helpful to conduct a simple mental experiment: see which of the two parties covered by conflicting defenses has a superior right to use force against the other.

The "special relationship" defenses win this competition for several reasons. One is that, by their very design, the victim protected by those defenses (a child or a person incapable of consent) is not a fully responsible rational agent. As a result, the perpetrator's paternalistic use of force does not constitute a measurable autonomy violation. Thus, autonomy-based defenses have to lose in the face of a "special relationship" defense. Moreover, the "lawful" character of the use of force pursuant to the defense of "special relationship" invalidates the use of force in self-defense and other defenses of that group. For example, a student may use reasonable force against a fellow student who takes his cell phone and refuses to return it. However, a student may not use force against a teacher who takes away the student's cell phone in punishment for sending text-messages during class.

The second reason for the priority of the "special relationship" privileges over other privileges is that, to qualify for a "special relationship" defense, the perpetrator has to act for the purpose of promoting a desirable social outcome and succeed in achieving it. Therefore, a true clash with the efficiency-based defense of necessity is impossible, just as it is impossible with autonomy-based defenses. Accordingly, if one conflicting party has a valid defense of "special relationship," the other party is not justified in the use of force against him. This conclusion makes a lot of sense: out of all justification privileges, the "special relationship" defense is the only one that imposes on the actor a duty, albeit discretional, to act in a certain way. Consequently, out of all justification privileges, the "special

relationship" defense is closest to the public duty defense, i.e., closest to the one based on the perpetrator's right and not just privilege.[62]

The fact that a true clash of the "special relationship" and any other justification privilege is impossible determines that only one side of the conflict may be justified. For the same reason, only one side may be justified in a conflict between a right-based defense and any other defense, or in a conflict between two "autonomy" defenses (e.g., if A is justified in using force against B, C will not be justified in using force against A in protection of B). Yet, a true clash of values is possible when a necessity defense competes with an autonomy defense, as in the Jack & Jill hypothetical. Although both parties are justified in what they do, it intuitively appears that Jill is more right than Jack. If she kills Jack in self-defense, she will be justified but Jack will not be justified if he kills Jill while trying to rape her or in response to her use of defensive force. Why is that so?

1. The Theory of Rights

The answer to this question depends, in part, on how we view Jack's and Jill's respective rights to physical inviolability. One way would be to say that Jill has never had a right "not to be raped." She only had a limited right "not to be raped, unless such rape is beneficial to society." Thus, Jack did not interfere with any right of Jill, since Jill did not have a right "not to be raped" in the first place.

This perspective, known as specification, appears seriously flawed: if we follow the view that people's rights are limited from the outset, we would not be able to explain why someone whose property was taken for public use or, arguably, someone whose autonomy was intruded for the sake of others is entitled to compensation. For example, under the specification theory, the mountain climbers who, during a snow storm, took refuge in a vacant cabin and consumed the owner's provisions would not have to compensate the owner. That outcome would not only be blatantly unfair but would also disagree with a significant body of law.[63]

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[62] Yet, it is not a right, at least not with respect to the general public. It imposes a duty to cooperate only on a very limited constituency of not fully responsible agents. It has no similar effect on the rest of the world. If I am present while a teacher attempts to use corporal punishment on a child, I am under no obligation to behave in such a way as not to prevent that from happening. I may distract the teacher and let the child escape. In contrast, if I intentionally distract a policeman in order to help a criminal to escape arrest, I will be guilty of a criminal offense.

[63] In "The Grammar", Fletcher seems to be sympathetic to the specification theory. *See* GRAMMAR MANUSCRIPT, *supra* note 1, at 65 (opining that "its plausibility is undeniable"). I disagree with that assessment and instead side with Fletcher in his powerful critique of the specification theory (he calls it the unity thesis) in his earlier article, *The Nature of Justification*.

A better theory is the one under which the owner of the cabin has unabridged property rights, and Jack and Jill each has an unabridged right to physical inviolability. Those rights, however, are not absolute. People may lose them either voluntarily (by consent) or involuntarily (by an unprovoked attack on legally protected rights of others). In addition, rights may be overridden although the right-holder did nothing to lose or reduce them.[64] For example, when Jack raped Jill, he overrode her right not to be raped in order to preserve equally or more important rights of a larger group of people. Jack's act, albeit justifiable from the perspective of the state, constituted a breach of his duty to Jill and gave her the right to disregard his own right to physical inviolability and fight back.

2. Innocent Aggressors

At the first glance, this theory seems paradoxical: why should Jack involuntarily lose his rights if he is justified?[65] He may be an aggressor but he is an innocent aggressor. How can it be the right thing to kill an innocent? There is a two-prong answer to these questions.

First, Jack's "innocent" status gives him a valid public claim against the state that he does not deserve to be punished. But that status does not necessarily give him a private claim against Jill that she not kill him in self-defense. After all, an actor excused by virtue of insanity is also an innocent aggressor. He also has a valid claim against the state that he does not deserve to be punished. Yet, most people would justify an innocent victim who used deadly force to resist a homicidal maniac.[66]

Moreover, a justified person (i.e., a person who has violated a prohibitory norm and now has to rely on a defense) should not be able to claim more inviolability than a person who has committed no criminal act at all. And a person who committed no criminal act at all

See supra, note 14.

64 See JUDITH JARVIS THOMSON, *Ceasing to Have a Right*, *in* THE REALM OF RIGHTS 348-73 (1990); JUDITH JARVIS THOMSON, *Self-Defense and Rights, in* RIGHTS, RESTITUTION AND RISK: ESSAYS IN MORAL THEORY 33, 42-48 (1986); JUDITH JARVIS THOMSON, *Some Ruminations on Rights*, *in* RIGHTS, RESTITUTION AND RISK: ESSAYS IN MORAL THEORY 49-65 (1986); JUDITH JARVIS THOMSON, *Rights and Compensation*, *in* RIGHTS, RESTITUTION AND RISK: ESSAYS IN MORAL THEORY 66-77 (1986).

65 The general consensus, which I challenge here, is that, if a person is justified, he is not an aggressor at all, not even an "innocent aggressor." *See, e.g.*, Larry Alexander, *Propter Honoris Respectum: A Unified Excuse of Preemptive Self-Protection*, 74 NOTRE DAME L. REV. 1475, 1481-82 (1999) (defining "innocent aggressors" as those "who appear to be attacking me *without legal justification*, but who are legally and morally nonculpable in doing so") (emphasis added).

66 *But see* Laurence A. Alexander, *Justification and Innocent Aggressors*, 33 WAYNE L. REV. 1177 (1987) (arguing that killing of innocent aggressors may only be excused but not justified).

(e.g., a sleepwalking killer) is not entitled to more inviolability than a homicidal maniac.[67]

Compare, for example, Fletcher's psychotic aggressor[68] with sleepwalking Mrs. Cogdon who, in a somnambulistic state, bludgeoned her daughter Pat to death with an axe.[69] Mrs. Cogdon was charged with murder but acquitted because the act of killing was deemed to be involuntary, and thus "was not, in law, regarded as her act at all."[70] Now, what if before the first fatal blow fell, Pat woke up and tried to defend herself – would she be justified if, after all other attempts failed, she shot her mother to death?

I think she would, in part, because I see little difference between a sleepwalking aggressor and a psychotic aggressor. Mrs. Cogdon killed Pat while acting in a dream in which she attempted to protect her daughter from violent intruders. From what we know about psychosis, Fletcher's aggressor could be acting under a delusion that a wild bear was about to attack him and he had to fight for his life.[71]

I am not trying to say that there is no difference between defenses of excuse and justification. Nor am I making a rather obvious point that, sometimes, the legal line between voluntary and involuntary conduct is blurred. Instead, these examples are meant to demonstrate that, as long as we recognize that (a) not all justifications are equal, and (b) one side to a conflict may be more right even when both sides are justified, the relevant question in a clash of two different justifications is not which party is innocent but rather which justification has priority. As between necessity and self-defense, the latter has priority. It has priority because necessity requires a breach of a duty to an innocent, unoffending party, whereas self-defense is always responsive and is permitted only to the extent necessary for the protection of an endangered right.

In the Jack & Jill case, for example, Jill has never *lost* her right not to be raped; her right not to be raped was *overridden*. From the perspective of punishment, it was overridden non-wrongfully but, from the perspective of Jill's individual rights, it was a wrongful act.[72] At all

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67 Fletcher would most likely disagree with this statement. He believes that a voluntary act is required in order to justify responsive use of force in self-defense. *See*, *e.g.*, GRAMMAR MANUSCRIPT, *supra* note 1, at 414-15.

68 *See* Fletcher, *supra* note 52 and accompanying text.

69 Norval Morris, *Somnambulistic Homicide: Ghosts, Spiders, and North Koreans*, 5 RES JUDICATAE 29, 29-30 (1951).

70 *Id.*

71 *See, e.g.*, MedlinePlus Medical Encyclopedia, http://www.nlm.nih.gov/medlineplus/ency/article/001553.htm (last visited Jan. 10, 2007) (defining psychosis as "a severe mental condition characterized by a loss of contact with reality"). Persons experiencing a psychotic episode may have hallucinations, hold delusional beliefs, demonstrate personality changes and exhibit disorganized thinking. *Id.*

72 I accept Thomson's distinction between infringement of a right and violation of a right to

moments of Jack's attack, she retained the right that he not do that to her. By disregarding Jill's right, Jack breached his duty to Jill and lost his own right to physical inviolability. That allowed Jill to fight back the same way she would be allowed to fight against a villainous aggressor.

Naturally, having a right and defending it are two different things. One's privilege to defend a violated right largely depends on the comparative magnitude of interests protected by the competing defenses. Although the law does not necessarily favor a more important interest (e.g., Jill may kill Jack in order to prevent rape), a person may not be justified in the use of force if the magnitude of his interest is *grossly disproportionate* to that of another justified party. For example, even though the cabin owner has the right that the mountain climbers not trespass on his property, he would not be justified if he forcibly evicted the mountain climbers back into the impending snow storm.[73] Similarly, the use of deadly force against an aggressor is justified only in protection of the most vital interests.[74]

To summarize the foregoing:

1. There are two different concepts of wrongdoing—one relating to private rights of an individual, and the other relating to punishment. A person may commit the former kind of wrongdoing without committing the latter.[75] One of such circumstances is when the perpetrator infringes upon a right of the victim but does so under the protection of a justification defense.
2. When parties claim conflicting justifications, their rights against each other and their ability to retain the justified

the extent it applies to justifiability of punishment but not to private rights of individuals. Take her own well-known hypothetical in which a person is kidnapped by the Society of Music Lovers to be used for kidney dialysis in order to save the life of a famous violinist. *See* Judith Jarvis Thomson, *A Defense of Abortion,* 1 PHIL. & PUB. AFF. 47, 48-49, 59-66 (1971). If we conclude that the person's rights here were not violated but merely overridden, he should not be justified in fighting for his freedom. At least legally (and, arguably, morally), that outcome would be wrong. Note, however, that a right violation is a necessary but not sufficient condition of one's privilege to enforce that right. *See, e.g.*, *infra* notes 73-74 and accompanying text.

73 *See*, *e.g.*, NEB. REV. STAT. § 28-1411(4) (2006); N.J. STAT. ANN. § 2C:3-6(b)(2) (West. 2006); 18 PA. CONST. STAT. § 507(c)(2) (2006); MODEL PENAL CODE § 3.06 cmt. 7(b) (1962) (stating a rule that a trespasser may not be expelled in circumstances in which extreme harm is likely to befall him). *See also* MODEL PENAL CODE § 3.06(3)(b) (disallowing the use of force to prevent or terminate trespass "if the actor knows that the exclusion of the trespasser will expose him to substantial danger of serious bodily harm").

74 *See*, *e.g.*, MODEL PENAL CODE § 3.04(2)(b) (providing that deadly force may be used only in defense against death, serious bodily injury, kidnapping and sexual intercourse compelled by force or threat).

75 The opposite is true as well. When Armin Meiwes killed and ate Bernd Juergen Brandes, he did not violate the latter's rights since the encounter was voluntary. Nevertheless, very few would deny that his act was wrongful and deserved punishment. *See* Bergelson, supra note 21.

status against the state depend, other things equal, on the relative rankings of their defenses.

3. Justifications based on the perpetrator's right (in the Hohfeldian sense) top the hierarchy of justifications and rule out any competing justification, whether based on another right or privilege. If a person acts pursuant to a right, any incompatible action on the part of another is simply wrong.
4. As between justifications based on mere privileges, people involved in incompatible actions may retain (necessity v. self-defense) or lose (self-defense v. "special relationship") their justified status with respect to the state. However, if both parties attempt to enforce conflicting claims based on incompatible privileges, at least one of them always acts wrongfully with respect to the other. The party who acts wrongfully loses his inviolability to the extent it needs to be disregarded in order to enforce the claim of the other party and presuming it is not disproportionately smaller than the wrongdoer's claim of inviolability.
5. What makes one party wrong with respect to the other is that, although he does not violate the law, he still violates that other party's right not to be harmed. As a result, he loses moral and legal parity with the victim: the victim retains his right not to be harmed even though that right is disregarded by the perpetrator, whereas the perpetrator loses his analogous right.
6. Two justifications can co-exist only between competing privileges, other than the "special relationship" privileges, and can never co-exist between a right (in the Hohfeldian sense) and a privilege. In most instances of co-existing justifications, one party is "more right" than the other. However, there may be cases in which both parties are justified yet equally wrong.

CONCLUSION

The goal of this article was to rethink the relationship between the theories of justification and wrongdoing, which play vital roles in Fletcher's scholarship. Reading the *"The Grammar"* in the context of Fletcher's other work has led me to one major disagreement with Fletcher as well as with the traditional criminal law theory: for Fletcher and pursuant to the traditional understanding, wrongdoing and justification mutually exclude each other; for me, they do not.

Focusing on the problem of incompatible justifications, I suggested that we should revise our understanding of justifications in general. Specifically, this article argues that, in certain circumstances, justifiable conduct may be wrongful; that in a conflict between two incompatible justifications, one side may be more right than the other; and that justifications should be viewed not as a homogenous group in which each defense has equal importance but, instead, as a hierarchical structure, in which the place afforded to a defense is determined by its rationale and effect on the rights of others. The top priority belongs to justifications that do not violate rights of others and, in addition, compel others to behave in a cooperative way (the public duty defenses). The intermediate priority belongs to justifications that neither violate rights of others nor create in others a duty to cooperate (the "special relationship" and autonomy defenses). Finally, the lowest priority belongs to the defense of necessity, which, by design, may involve violation of rights of innocent, unoffending individuals.